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RICHARD R. ROOT

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE, *ex rel.* ROBERT E. COOPER, ATTORNEY GENERAL,	)	
Plaintiff,	)	
v.	)	No. 06C1093
CONSUMER DEPOT, LLC, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF STATE OF TENNESSEE'S MOTION FOR SUMMARY JUDGMENT

Introduction

This is a civil law enforcement proceeding brought by the Attorney General of the State of Tennessee ("Attorney General" or "State") pursuant to the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.* ("TCPA" or "Act") to secure injunctive and other relief prohibiting the Defendants from engaging in deceptive advertising and other unfair and deceptive acts and practices.

I. SUMMARY OF ARGUMENT

The State is entitled to summary judgment under Counts One and Two of its Amended Complaint because all defendants have engaged in unfair and deceptive acts and practices under the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*

Defendants' advertising is "deceptive" on its face and meets the legal definition of

"deception" under Tenn Code Ann. §§ 47-18-104(a) and 47-18-104(b), as well as well settled Federal Trade Commission law.

Defendants' admitted commercial conduct is "unfair" and meets the legal definition of "unfairness" under Tenn Code Ann. § 47-18-104(a) and well settled Federal Trade Commission law.

For these reasons, summary judgment should be granted to the State under Counts One and Two of the Amended Complaint.

II. STANDARD FOR SUMMARY JUDGMENT

"The moving party is entitled to summary judgment only if the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk*, 271 S.W.3d 76, 83 (Tenn. 2008). "The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Id.*, *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).

"If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist." *Martin v. Norfolk*, 271 S.W.3d at 84; *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). "A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.* "Any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party." *Martin v. Norfolk*, 271 S.W.3d at 84; *Byrd v. Hall*, 847 S.W.2d at 215.

III. ARGUMENT

A. Background of the Tennessee Consumer Protection Act

The TCPA is Tennessee's version of a "Little FTC Act." *Tucker v. Sierra Builders, Inc.,* 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005). "Little FTC Acts were so designated because of their similarity to the provision of the Federal Trade Commission Act that outlaws unfair or deceptive trade practices." *Id.*

The model for the TCPA was developed by the Federal Trade Commission ("FTC") in conjunction with the Committee on Suggested State Legislation of the Council of State Governments and is patterned after Alternative # 3 of the Unfair Trade Practices and Consumer Protection Law. *See* Council of State Governments, 1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law - Revision (Vol. XXIX), Clearinghouse No. 31, 035 B, attached in Appendix of Authorities, filed herewith. *See also* D. Pridgen, *Consumer Protection and the Law*, § 3:5 (2002).

B. The Two Main Operative Provisions of the TCPA

The TCPA has two main operative provisions: Tenn. Code Ann. § 47-18-104(a) and Tenn. Code Ann. § 47-18-104(b).

Tenn. Code Ann. §104(a) provides, in pertinent part:

> Unfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices . . . .

See Tenn. Code Ann. § 47-18-104(a). Count One of the State's Amended Complaint is based on Tenn. Code Ann. § 47-18-104(a).

In turn, Tenn. Code Ann. § 47-18-104(b) contains a "laundry list" of thirty-six prohibited acts and practices which constitute *per se* deception under the Act. As such, the

described conduct is deceptive as a matter of law and the State need not separately prove that the prohibited conduct is deceptive. Tenn. Code Ann. § 47-18-104(b) forms the basis of Count Two of the State's Amended Complaint.

C. The TCPA Is A Remedial Statute Which Must Be Liberally Construed

The TCPA is a remedial statute. *Tucker v. Sierra Builders*, 180 S.W.3d at 114 (*citing* Tenn. Code Ann. § 47-18-115); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998); *Morris Mack Used Cars,* 824 S.W.2d 538, 540 (Tenn. 1992). The TCPA mandates that it must be "liberally construed to ... protect consumers and legitimate business enterprises from those who engage in deceptive acts or practices." Tenn. Code Ann. § 47-18-102(2). *See also Ganzevoort v. Russell,* 949 S.W.2d 293, 297 (Tenn. 1997); *Morris v. Mack's Used Cars*, 824 S.W.2d at 540 (*quoting Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297, 305 (Tenn. Ct. App. 1984).

As a liberal, remedial law, the TCPA was not intended to be a codification of the common law and its scope is much broader than that of common-law fraud:

> To the contrary, one of the express purposes of the TCPA is to provide additional supplementary state law remedies to consumers victimized by unfair or deceptive business acts or practices that were committed in Tennessee in whole or in part.

Tucker v. Sierra Builders, Inc., 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005) (*citing* Tenn. Code Ann. §§ 47-18-102(2) and (4)).

An act or practice can be deceptive even if there is no intent to deceive. *See, e.g., FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 575 (7th Cir. 1989); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988).

"Knowledge" is not an element of deception. *Smith v. Scott Lewis Chevrolet, Inc.*, 843

S.W.2d 9 (Tenn. App. 1992). Reliance is not required. *Harvey v. Ford Motor Credit Co.*, 1999 WL 486894, at *2 (Tenn. Ct. App. 1999). Even a negligent misrepresentation can constitute a violation of the TCPA. *Id.* at 13. Thus, the State does not need to prove that any consumer was actually misled or deceived in order to prove that a violation of law has occurred. *Tucker v. Sierra Builders*, 180 S.W.3d at 115; *Cf. Williams v. Bruno Appliance and Furniture Mart*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978).

The TCPA provides for two different types of action. A private right of action is available under Tenn. Code Ann. § 47-18-109 and a civil law enforcement action, like the present action, is available under Tenn. Code Ann. §§ 47-18-108.

Notably, in considering the remedial nature of the TCPA in the context of a civil law enforcement proceeding, it is also important to note that in enacting the TCPA, the General Assembly explicitly stated it intended to promote the policy of "maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels be had in [Tennessee]." Tenn. Code Ann. § 47-18-102(4).

D. Interpretation of the TCPA

Tenn. Code Ann. 115 mandates that the TCPA be interpreted "consistently with the interpretations given by the Federal Trade Commission and the federal courts pursuant to §5(A)(1) of the Federal Trade Commission Act." Tenn. Code Ann. § 47-18-115. *See also Tucker v. Sierra Builders, Inc.*, 180 S.W.3d at 115; *Ganzevoort v. Russell*, 949 S.W.2d at 298. Thus, resort to FTC law is proper in order to correctly interpret the commercial conduct at issue in this case.

E. "Deception" Under the TCPA

The first section of the TCPA, Tenn Code Ann. § 47-18-194(a) does not define "unfair" or "deceptive." *See also Tucker v. Sierra Builders*, 180 S.W.3d at 115. In order to give the broadest scope possible to the protections embodied in the statute, and in order to prevent ease of evasion because of overly meticulous definitions, consumer protection laws like the TCPA typically make no attempt to define "unfair" or "deceptive," but merely declare that such acts or practices are unlawful, thus leaving it to the court in each particular case to determine whether there has been a violation of the statute. *See* D. Zupanec, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 ALR3d 449, 458 (1979). *See also Tucker v. Sierra Builders*, 180 S.W.3d at 114; *Pan American World Airways v. United States*, 371 U.S. 296, 307-08 (1963).

The Tennessee courts have looked to FTC law in defining "deception" under the TCPA. *See Tucker v. Sierra Builders*, 180 S.W.3d 109 (Tenn. App. 2005). *Tucker v. Sierra Builders* holds that under the TCPA, deception is conduct that "causes or tends to cause a consumer to believe what is false, or that misleads or tends to mislead a consumer as to a matter of fact." 180 S.W.3d at 115. Similarly, FTC case law holds that an act or practice is deceptive if it is "likely to deceive." *FTC v. Consumer Alliance, Inc.*, 2003 WL 22287364, at *4 (N.D. Ill. Sept. 30, 2003); *FTC v. Gill*, 71 F.Supp.2d 1030, 1037 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

In its Amended Complaint, the State alleges that the acts and practices defendants have committed in connection with their advertisements, representations and failures to disclose fall under the category of "deceptive" conduct under the TCPA. In order words, defendants'

"marketing" representations are at issue in the "deceptive" conduct portion of this case. In addition, for purposes of the present motion regarding the State's allegations regarding "deception," the State does not need to prove that any consumer was actually misled or deceived, but only that the defendants' conduct **tends to cause a consumer to believe what is false** or **tends to mislead a consumer**. *Tucker v. Sierra Builders*, 180 S.W.3d at 115.

F. "Unfairness" Under the TCPA

"Unfairness" under the TCPA is a separate and legally distinctive from deception. *Tucker v. Sierra Builders,* 180 S.W.3d at 116 - 117. In *Tucker v. Sierra Builders*, the court properly followed the FTC law on "unfairness." *Id.* In particular, the court followed the FTC policy statement on unfairness as set forth in 15 U.S.C.A. § 45(n), and defined "unfairness" as "an act or practice that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Tucker v. Sierra Builders*, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)).

In its Amended Complaint, the State alleges that all of defendants' acts and practices that have to do with how they treat their customers, *i.e.*, retaliation against complaining consumers with negative feedback, refusals to issue promised refunds, obstructions in the return process, etc., fall under the category of "unfair" conduct under the TCPA.

Thus, in connection with the State's allegations of "unfair" conduct by the defendants, the State only needs to show that the challenged commercial activity:

(1) Is likely to cause substantial injury to consumers;

(2) Is not reasonably avoidable by consumers themselves; and

(3) Is not outweighed by countervailing benefits to consumers or to competition.

Tucker v. Sierra Builders, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)).

The term "substantial injury," as used in an unfairness analysis, means one of two things: (1) "a relatively small harm is inflicted on a large number of consumers" (which is the case here), or (2) "a greater harm is inflicted on a relatively small number of consumers." *Id. (citing Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988)).

As will be detailed below, deceptive conduct can be found as a matter of law, because it appears on the face of defendants' advertising. Similarly, unfair conduct can be found as a matter of law, because defendants have admitted in engaging in certain unfair conduct, such as retaliating against a large number of complaining consumers, for example. The State therefore submits that the material facts which are necessary to establish violations of the TCPA are supplied by the defendants themselves through their own advertising and admissions.

G. DEFENDANTS' ADVERTISING IS DECEPTIVE ON ITS FACE

The State respectfully submits that in evaluating the question of whether defendants have engaged in unfair or deceptive advertisement, the Court needs to determine whether defendants' marketing conduct "causes or tends to cause a consumer to believe what is false, or that misleads or tends to mislead a consumer as to a matter of fact." *Tucker v. Sierra*, 180 S.W.3d at 115.

The primary evidence in a false advertising case is the advertising itself. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). Thus, resort to defendants' advertising and marketing representations is the best source of evidence for

resolving this question.

The State's Memorandum of Facts and the two volumes of exhibits accompanying its memorandum and motion set forth numerous affidavits from consumers who claim they were deceived by the defendants. *See, e.g.*, Affidavits of Amity Armes, William Bartling, Harold Bryson, Mark Citro, Justin Kennedy, Gerald Koehler, Justin Kennedy, Mitch Krinsky, Barbara Layton, Veronica LaRock, Brian Lock, John Machata, Chris Martin, Marvin McDermott, Katrina Moultrie, Mark Muto, Chris Myers, Dhamija Pradeep, Ralph Schuler, Kimberly Scripture, Steven Streiff, Gevon Ware, Manuel Weiss, Marvin Weissman, Mary Wilkes and exhibits thereto, **A37 - A39, A45 - A96, A98 - A189, A541 - A559, A591 - A611** and **A622 - A627.** The consumers' various complaints have been set forth in detail, but when one examines the underlying advertisements, these consumers' anger and confusion becomes readily understandable as defendants' advertising is confusing and misleading on its face.

For example, consumer Amity Armes bought what she believed was a brand new iPod armband from Consumer Depot which arrived covered in blood and sweat. *See* Affidavit of Amity Armes and exhibits there, **A552 - A559**. While the State does not believe defendants dispute Ms. Armes' version of the account, this question does not need to be reached. Defendants own eBay auction from this transaction reveals legally deceptive conduct.

The Bargain Depot header which defendants used in Ms. Armes' advertising contained the prominent representation that all of Bargain Depot's good were new.

See Exhibit A to Armes Aff., **A547**. The terms "OVERSTOCK" "END OF LIFE" and "SURPLUS" clearly denote new merchandise, albeit left-over new merchandise.

In a later, "fine print" section of the auction, below that part of the web page, Consumer Depot says something different:

About Our Products

As one of the nation's largest liquidators, BargainDepot04 offers tremendous savings on open box - surplus, obsolete, end of life inspected returns. Our products come from some of the largest Retailers in America. Many of these items are in like new condition. These items are an excellent value for much less than retail. We make every attempt to photograph and describe the items accurately. Because these products are open box, there is a risk that the item may be incomplete and/or show some signs or wear. We offer a 7 day return policy on items other than consumables.

See **A548 - A549.** In particular, and for the first time, Consumer Depot "adds" another descriptive term to its "surplus," "obsolete" and "end of life" language, and changes "end-of-life" to "end-of-life inspected **returns.**" *Id.* Thus, Consumer Depot is also using the Bargain Depot sales vehicle to sell **used** merchandise.

As a general rule, "[t]he test to be used in interpreting advertising is the net impression that the advertisement it is likely to make on the consuming public. *Murray Space Shoe v. F.T.C.*, 304 F.2d 270 (2nd Cir. 1962); *In the Maryland Carpet Outlet, Inc.*, 85 FTC 754 (1965). "A glance at the advertising is all that is required to determine whether the advertising is deceptive." *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Williams v. Bruno Appliance and Furniture Mart*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978).

If an advertisement is capable of two meanings, one of which is false, it is deceptive. *Giant Food v. FTC*, 322 F.2d 977, 981 (D.C. Cir. 1963). Thus, Consumer Depot's eBay auction for Mrs. Armes' allegedly **New Apple Brand iPod Shuffle Armband** is deceptive on its face, because on the one hand, it explicitly stated and gave the impression that Mrs. Armes' arm band was new, but in a later "fine print" section, disclosed it was selling used items as well.[1] Stated differently, defendants' conduct not only "tends to cause a consumer to believe what is false ... or tends to mislead a consumer as to a matter of fact,"[2] but actually mislead Mrs. Armes and the many other consumers who complained of receiving used merchandise when they thought they were buying new merchandise.

This type of deceptive conduct violates both Counts One and Two of the Amended Complaint, in that it violates Tenn. Code Ann. § 47-18-104(a) and § 47-18-104(b)(27). Defendants' misrepresentations also constitute *per se* deception under § 104(b)(7) of the Act, which makes it deceptive to represent that goods "are of a particular standard, quality or grade ... if they are of another." Similarly, under Tenn. Code Ann. § 104(b)(21), it is *per*

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[1] Of course, it is also deceptive to advertise merchandise as new, but sell merchandise that is used, damaged or refurbished. *Kerran v. FTC*, 265 F.2d 246 (10th Cir. 1959).

[2] *Tucker v. Sierra Builders*, 180 S.W.3d 109 (Tenn. Ct. App. 2005).

se deceptive to use "[s]tatements or illustrations in any advertisement which create a false impression of the grade, quality ... usability or origin of the goods ...."

Consumer Depot's claims or representations concerning warranty coverage are also misleading as a matter of law. Defendants' various advertising frequently has claims or statements regarding warranties and return periods, but once again such claims are made with later, inconsistent "no refund" disclosures.

For example, Consumer Depot made this representation through its Return Dealz trade name:

> This [movie/DVD] is brand new; the Paper cover got wet. - Another unbelievable bargain just for you. This item is BRAND NEW !!! Bid NOW. The photo above is the item you are bidding on.
>
> - Have questions? Click here!
> - Return defective product (Get RMA#)

See, e.g., Wilkes Aff. ¶ 2 and Exhibit A thereto, **A168 - a169** and **A174**. In another place on the auction page, Consumer Depot stated the movie DVDs it was selling were "brand new," still in their original packages and were fully "SEALED," although the paper covers for the DVD might be a little wet. **See** Wilkes Aff. ¶ 3, **A169**. Consumer Depot's advertising thus gave the impression that the DVDs were returnable if there was a problem.

When Mrs. Wilkes received her DVDs from Consumer Depot, both DVDs were in terrible condition and were totally unusable. Wilkes Aff. ¶ 5. When Ms. Wilkes went to Consumer Depot's eBay site to return these DVDs and clicked the "Return defective product" link at the end of the auction details as directed, Consumer Depot stated:

AUCTION # 6469815528 was 'SOLD AS IS' and is NOT eligible for RMA/Return.
Please click here to refer to your AUCTION for more information.

Id. and see Exhibit C, thereto, **A169**, **A174**, **A179** and **A182**. Mrs. Wilkes thought it was very misleading for Consumer Depot to place a link for returning defective products by each auction description on the one hand, and then to place separate "As-Is" and "No Returns" messages in separate portions of the auction pages next to photographs of unrelated auction items. *Id.*

Such claims violate Count One of the Amended Complaint under Tenn. Code Ann. § 47-18-104(a) of the TCPA, *Montgomery Ward v. F.T.C.*, 379 F.2d 666, 670-71 (D.C. Cir. 1985) and also violate Count Two of the Amended Complaint in that they constitute *per se* violations of Tenn. Code Ann. § 47-18- 104(b)(12) which makes it deceptive to represent that a consumer transaction confers rights, remedies or obligations that it does not have, and Tenn. Code Ann. § 47-18-113(b), in that they impose illegal and unlawful contractual terms and disclaimers.

Another significant area of advertising deception has to do with the defendants' claims that certain items have been tested or inspected by technicians or other technically trained personnel. Defendants use terms like **"tested," "inspected," "trained technicians,"** etc., to expressly and implicitly create the false impression that some sort of technical examination of the advertised product occurred prior to sale, ensuring the product is functional. *See, e.g.*, Citro Aff., **A45 - A50**, Machata Aff., ¶¶ 2-12, **A77 - A84**, Lock Aff., ¶¶ 1-7, **A69 - A76**; Myers Aff., ¶¶ 1-9, **A118 - A123**, Weiss Aff., **A155 - A156**, Weissman Aff., **A161 - A162**, Streiff Aff. ¶ 6, **A623** and BBB Complaints at **A290**, **A333**, **A430**, **A432**, **A487**, **A520** and **A536**.

Without dispute, defendants clearly make this type of representation repeatedly in their advertising. *Id.* The deception, however, comes into play based on Consumer Depot's admission that these alleged technical inspections really consist of nothing more than turning items "on."

During deposition testimony, Martin Fike admitted that when Consumer Depot advertises that an item, such as a PDA, is "inspected by our technician to ensure that it is functional," all that means is that employees who may have no special training, do nothing more than simply turn an item on. *See* Deposition of Martin Fike, pp. 159 - 160, **A741**. Thus, in addition to being expressly false, defendants' advertising implicitly creates a false impression of functionality, *i.e.*, the items work because they passed inspection.

Impressions are the primary targets of ad writers.[3] The important question to be resolved is the impression given by an advertisement as a whole.[4] Here, the record contains numerous examples of defendants' practice of falsely advertising that merchandise was technically inspected and, therefore, implicitly functional. *See* Citro Aff., **A45 - A50**, Machata Aff., ¶¶ 2-12, **A77 - A84**, Lock Aff., ¶¶ 1-7, **A69 - A76**; Myers Aff., ¶¶ 1-9, **A118 - A123**, Weiss Aff., **A155 - A156**, Weissman Aff., **A161 - A162**, Streiff Aff. ¶ 6, **A623** and BBB Complaints at **A290**, **A333**, **A430**, **A432**, **A487**, **A520** and **A536**.

Defendants' above misrepresentations violate both Counts One and Two of the Amended Complaint, in that they violate Tenn. Code Ann. § 47-18-104(a) and § 47-18-

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[3] *Stanley Laboratories v. Federal Trade Commission*, 138 F.2d 388, 392 (9th Cir. 1943).

[4] *U.S. v. 95 Barrels of Vinegar,* 265 U.S. 438, 442-43 (1924); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1954); *Giant Food Inc. v. F.T.C.*, 322 F.2d 977, 981-82 (D.C. Cir. 1963).

104(b)(27). They also constitute *per se* deception under § 47-18-104(b)(2) which makes it deceptive to cause a "likelihood of confusion or of misunderstanding" as to the "approval or certification of goods."

II. DEFENDANTS' CONDUCT IS UNFAIR

The single best example of unfair conduct by defendants has to do with their practice of retaliating against consumers who leave them negative feedback by automatically posting negative feedback against those consumers. Numerous consumers have complained about undeserved, retaliatory negative feedback they received from Consumer Depot after posting such feedback for Consumer Depot's misleading or false advertising. *See, e.g.*, Affidavits of Amity Armes, William Bartling, Harold Bryson, Mark Citro, Justin Kennedy, Gerald Koehler, Justin Kennedy, Mitch Krinsky, Barbara Layton, Veronica LaRock, Brian Lock, John Machata, Chris Martin, Marvin McDermott, Katrina Moultrie, Mark Muto, Chris Myers, Dhamija Pradeep, Ralph Schuler, Kimberly Scripture, Steven Streiff, Gevon Ware, Manuel Weiss, Marvin Weissman, Mary Wilkes and exhibits thereto, **A37 - A39, A45 - A96, A98 - A189, A541 - A559, A591 - A611** and **A622 - A627.**

Consumers have noted that such conduct by an eBay seller is intimidating and undoubtedly deters consumers from leaving negative feedback against Consumer Depot for fear of retaliation. *See, e.g.,* McDermott Aff., **A88 - A95**. Other consumer have noted such conduct artificially inflates Consumer Depot's already bad eBay ratings, because consumers refrain from posting negative feedback out of fear of retaliation. *See, e.g.*, Bartling Aff., **A541 - A551**. As a result of these heavy-handed tactics and retaliation, the public, self-regulating aspects of eBay have been undermined.

Based on the law of "unfairness," such retaliation "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Tucker v. Sierra Builders*, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)). Consumer Depot's acts and practices in connection with their customers, *i.e.*, retaliation against complaining consumers with negative feedback has caused harm to a very high number of consumers (over 20,000 based on the negative feedback records filed with the Amended Complaint), and was not reasonably avoidable by the consumers because by paying promptly as required, they had no reason to fear such feedback. *Tucker v. Sierra Builders*, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)).

III. ALL DEFENDANTS ARE LIABLE FOR CONSUMER DEPOT'S UNLAWFUL CONDUCT

An individual defendant is liable for the unfair or deceptive trade practices of an entity if the individual (1) has the authority to control the entity and has some knowledge of the wrongful acts or practices, or (2) directly participates in the wrongful acts or practices. *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). All of the defendants have admitted and have been found by this Court to actively participate in Consumer Depot's conduct, with authority to control Consumer Depot. *See* December 16, 2008 Order. Moreover, all defendants have testified they have knowledge of the wrongful acts and practices of Consumer and have directly participated in the same. See Martin Fike, Carol Fike and Michael Hinds depositions, **A787 - A953**.

CONCLUSION

The conduct at issue in this case constitutes the very worst in commercial behavior and blights every legitimate Tennessee business that operates honestly and ethically. Most of the defendants' unlawful conduct has persisted for years, and continues unchanged today despite the fact defendants were ejected from the Better Business Bureau and made aware of the multitudes of complaints consumers have filed with various government authorities and others. Without injunctive intervention, defendants will continue to exploit the public through their deceptive and abusive course of business, and will continue to reap millions of dollars in annual sales by deceiving the public.

The State respectfully requests that the Court enter summary judgment as requested and impose injunctive relief prohibiting such conduct. The State further requests that the Court grant the ancillary relief requested in the Amended Complaint and schedule a hearing to conclude the monetary portions of this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, OLHA N.M. RYBAKOFF, hereby certify that on Tuesday, February 10, 2009, I caused a true and exact copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF STATE OF TENNESSEE'S MOTION FOR SUMMARY JUDGMENT to be served by placing a copy thereof in the United States First Class Mail, postage prepaid, addressed to:

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